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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 24 Original

STATE OF ARIZONA, Complainant,

vs.

STATE OF CALIFORNIA, PALQ VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants.

UNITED STATES OF AMERICA, Intervener,

STATE OF NEVADA, Intervener.

RESPONSE OF THE STATES OF COLORADO, WYOMING, UTAH AND NEW MEXICO TO MOTION OF THE UNITED STATES OF AMERICA FOR DETERMINATION OF QUESTIONS OF LAW PRIOR TO DETERMINATION OF JOINDER MOTION.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1954
No. 10 Original

STATE OF ARIZONA, Complainant,
vs.
STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants.
UNITED STATES OF AMERICA, Intervener,
STATE OF NEVADA, Intervener.

RESPONSE OF THE STATES OF COLORADO, WYOMING, UTAH AND NEW MEXICO TO MOTION OF THE UNITED STATES OF AMERICA FOR DETERMINATION OF QUESTIONS OF LAW PRIOR TO DETERMINATION OF JOINDER MOTION.

PRELIMINARY STATEMENT

The State of Arizona instituted this action against the State of California and others; thereafter, the United States of America and the State of Nevada intervened. California moved to join the States of Colorado, Wyoming, Utah and New Mexico as parties to the action. Extensive briefs on the question of joinder were filed in this Court by all parties to the action except the United States, and by the States of Colorado, Wyoming, Utah and New Mexico.

On February 28, 1955, the Court referred the joinder motion to the Special Master, the Honorable George I.

Haight, "to hear the parties and report with all convenient speed his opinion and recommendation as to whether the motion should be granted."

The Special Master held hearings on the joinder motion in Phoenix, Arizona, on April 12, 13, 14 and 15, 1955. At this hearing all parties to the action were represented by counsel. Also present by their counsel were the States of Colorado, Wyoming, Utah and New Mexico. All parties represented at the hearing, except the United States, participated in the hearing and the oral arguments. Although the United States was represented by counsel at the hearing, they did not participate in the arguments, although given an opportunity to do so. The following is taken from the report of the oral arguments in Volume 1, at page 5:

"The Master: How about the United States?"

"Mr. Rankin: The United States will not require any time on the motion.

"The Master: You have filed no briefs and do not intend to speak?"

"Mr. Rankin: That is right.

"The Master: What would you do if the Master asks you some questions?"

"Mr. Rankin: We will try to answer, depending upon the question, though we may stand mute at times."

Later during the oral arguments, the following took place:

"Mr. Ely: Your Honor, I understand that counsel for the United States may not be here all through tomorrow, and while counsel for the government is still here I should like to suggest to Your Honor that it might be appropriate to address to the United States in some form an inquiry as to what position it cares to take as to the necessity of joinder of the absent states with respect to the claims made by the United States. We are in the dark as to how certain allegations of the government pleadings are interpreted by the United

States itself, particularly as to the Indian claims and their effect upon the Upper Basin.

“Mr. Chilson: If the Master please, on behalf of Colorado I seriously object to the suggestion made by Mr. Ely. The United States had an opportunity to come in here and file briefs and make its position clear if it took any position on this motion. It has not seen fit to do so, which is their right. They can remain neutral, they can remain mute, and they have done so. I think it would be entirely wrong to follow the suggestion of counsel for California.

“The Master: I will say right now I am not going to force the United States to say anything. If they wish to stay out and let it be a quarrel between states, I think that is their privilege. We are going to encounter a quite different situation when we get into the merits and when we get into the merits, one of the first things I am going to ask is to have a statement from the United States, particularly in regard to the Indians, because that is a subject of considerable mystery to me so far, and I think we all ought to know; but I believe that goes to the merits.

“Now, on this motion, if the United States comes in here and says, ‘We file no brief, we make no argument, we leave it to the states to battle it out, we will stand by the result whatever it may be,’ I think that is their privilege.

“Mr. Veeder: Thank you Your Honor.”

(See Oral Arguments, Volume II, pages 355 and 356).

On July 11, 1955, the Special Master made his report to this Court and submitted to the Court the following recommendation:

“VII. RECOMMENDATION.

“Accordingly, it is recommended that the Motion of the California parties to join the States of Colorado, Wyoming, Utah and New Mexico as parties to this cause, in their capacities as Upper Basin States and in

respect to Upper Basin waters be denied. It is a further recommendation that as to each of the States Utah and New Mexico in their capacities as Lower Basin States and in relation to their respective Lower Basin waters only that the said Motion be allowed."

(Special Master's Report, page 69).

In October, 1955, California and Nevada filed exceptions to the Master's report and requested oral argument on the joinder motion and the exceptions.

Thereafter and on or about October 24, 1955, Colorado and Wyoming received a copy of the motion of the United States of America for determination of questions of law presented by the pleadings and the Report of the Special Master.

STATEMENT OF THE QUESTIONS PRESENTED

The motion of the United States is to the effect that there are certain legal questions which have a bearing on the determination of the joinder motion, and which should be determined by this Court before a determination of the joinder question.

The motion requests the Court to order briefs filed in connection with these legal questions before action on the joinder motion.

The legal questions which the motion of the United States contends should be first determined are:

1. Is Arizona a party to the Colorado River Compact, and thereby entitled to share in the water apportioned to the Lower Basin by that compact?
2. Are Indian claims to use of water a charge against the river as a whole, or are they to be satisfied from water apportioned by the Colorado River Compact to the basin in which the water use is made?

We object to the granting of the motion of the United States for the following reasons:

1. These legal questions and their bearing on the joinder motion, have been fully discussed and argued in the

briefs filed herein on the joinder motion and in the oral arguments before the Special Master.

2. The Special Master, after consideration of these questions and their bearing on the joinder motion, was of the opinion that the Upper Basin States, in their Upper Basin capacities, were not necessary or indispensable parties to this litigation.

3. That the United States had ample opportunity to file briefs with this Court and to participate in the proceedings before the Special Master, and state its position on these legal questions and their bearing on the joinder question, but refused so to do. Having waived its rights to participate, the United States should not now be heard on the joinder question.

ARGUMENT

I. THE QUESTION OF WHETHER OR NOT ARIZONA IS A PARTY TO THE COMPACT, HAS NO BEARING ON THE JOINDER QUESTION IN THIS ACTION.

The Colorado River Compact divides the use of the waters of the Colorado River between the Upper Basin and the Lower Basin. *The compact, by intent, does not divide the use of waters within either basin.*

Because the Colorado River Compact did not divide water use within either basin, the States of each basin have faced the problem of dividing the water use apportioned to the basin among the States therein.

The Upper Basin attacked the problem by negotiation, which eventually led to a division of the Upper Basin use by an agreement in the form of the Upper Colorado River Compact. By this compact the water apportioned to the Upper Basin by the Colorado River Compact was divided among the States of the Upper Basin. In view of the fact that the Colorado River is the only major source of water remaining for the development and growth of the Upper Basin region, division by agreement was thought improbable if not impossible, but this monumental task was achieved.

The Upper Basin Compact was negotiated and ratified without the consent or participation of the Lower Basin.

The Lower Basin of the river failed to accomplish the division of its water use by agreement, and this action was brought for the purpose of obtaining a division among the States of the Lower Basin, of the water use apportioned to the Lower Basin by the Colorado River Compact.

The Lower Basin States were not necessary parties to the division of the Upper Basin's apportionment, and the Upper States, in their Upper Basin capacities, are not necessary parties to a division of Lower Basin water use, whether that division is by agreement and compact or by litigation.

In this respect the Special Master said:

"Although a Compact may be no more than a contract between States, it does not follow that all the parties to the Colorado River Compact must be parties here.

"The Compact, by its terms, provides two separate groups in the Colorado River Basin. Each of these is independent in its sphere. The members of each group make the determinations respecting that group's problems. To destroy this arrangement made by the Colorado River Compact and to make the members of one group parties to the controversies of another group would be to deny the arrangement to keep the two groups separate and apart. The many cases which have been cited in support of the Motion do not bear upon this plain fundamental consideration. Save for some justiciable controversy existing between these two groups or between members of one group in respect to members of another group, there can be no sound reason for joining in a controversy within one group on the ground that in the making of the separation by the Colorado River Compact the members of both groups were parties thereto."

(Special Master's Report, pages 33 and 34).

By Article III(a) of the Colorado River Compact, there is apportioned in perpetuity to the Upper Basin the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum. The Upper Basin's present consumptive use is approximately 2,500,000 acre-feet per annum, or about one-third of its apportionment. (See Hearings Before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United States Senate, 83rd Congress, Second Session, on S. 1555, page 286).

There is no allegation in the pleadings, and the facts warrant no allegation, that the Upper Basin is exceeding its apportioned use or is depriving the Lower Basin, or any user in the Lower Basin, of any water or right under the Colorado River Compact. Neither is there any allegation in the pleadings by the United States that the Upper Basin is depriving the United States of any rights which it claims in the Lower Basin or the Upper Basin.

Clearly the scope of the present action, and the justiciable issues therein, relate solely to a division of the Lower Basin's apportionment under the compact, among the various states in the Lower Basin and the United States. The Special Master, in this regard, said:

"This cause was initiated by Arizona, as a Lower Basin State to quiet its title to waters of that basin." (Page 35, Special Master's Report).

The Special Master further said:

"We find that the United States, as an intervener, does not attempt, even were it allowable so to do, to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin."

(Page 44, Special Master's Report).

Let us now turn to the motion of the United States. There is nothing of substance in this motion which was not argued before and considered by the Special Master. The question of whether or not Arizona is a party to the Colorado River Compact, and the bearing of this question on

the joinder of the Upper States, was argued at length in the briefs and in the oral argument before the Master.

Whether Arizona is or is not a party to the compact and entitled thereby to share in the apportionment to the Lower Basin under the Compact, is of only academic interest to the Upper Basin. Whether the Lower Basin's share is to be divided between California, Arizona and Nevada, or only between California and Nevada, neither increases nor decreases the Upper Basin's rights and obligations under the compact.

Arizona's claim in this suit is limited to a share of water use under the compact, and not in derogation or outside of the compact.

The United States, in Section IV of her motion, states:

"It is patent that if the contracts between the United States of America and the State of Arizona should fall by reason of the determination that Arizona is not a party to the Colorado River Compact, its claimed rights to the water in the Colorado River would be materially changed, very probably presenting issues that could not be resolved without the presence of the parties California seeks to join."

We disagree with this statement. Arizona, by her complaint and otherwise, has specifically limited her claim in this action to a part of the Lower Basin apportionment under the compact.

In her brief filed in opposition to the motion of the United States, Arizona states:

"It asked for no relief whatsoever aimed at any water which was not apportioned to the Lower Basin of the Colorado by the Compact."

If, therefore, it should be determined in this action that Arizona is not entitled to water under the compact, then certainly in this action Arizona cannot enlarge its claim to one in derogation of or outside of the scope of the compact.

Should Arizona at any time in the future institute liti-

gation, making claim beyond the Lower Basin's apportionment, most certainly the Upper Basin States will be concerned. No such issue has here been raised.

The Special Master, after considering the briefs and hearing the question discussed at length in oral argument, said:

"The California defendants maintain that this question raises a justiciable controversy between the present parties and the four absent States, because (1) the absent States are members of the Compact, (2) a Compact is no more than a contract, and (3) parties to a contract cannot have new parties added to that contract, any more than could new provisions be added to it, in litigation to which they are not parties.

"The Upper Basin opponents to this Motion are parties to the Compact, but deny that the question of Arizona's status respecting the Colorado River Compact is sufficient to grant the joinder motion because (1) to them it is immaterial whether or not Arizona is a party, and (2) their obligations and rights will not be affected regardless of the determination of this question since they are controlled by the Compact.

"Arizona pleads that it is a party to the Compact. The proponents of the Motion deny this. No one has questioned the membership of the Upper Basin States in the Colorado River Compact or their rights and obligations thereunder. No one charges them with any failures of performance. How the waters of the Lower Basin are apportioned and whether in that apportionment Arizona technically or in equity is a party to the Colorado River Compact can be of no interest to them as Upper Basin States. The Court can do complete justice between the present parties without affecting the rights of the Upper Division States with regard to the waters of the Upper Basin. Further, we call attention to the provisions of Articles VIII and IX of the Compact and Section 13(a) of the Boulder Canyon Project Act following:

"Article VIII. *Present perfected rights to the beneficial use of waters of the Colorado River System*

are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

“‘All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.’ (Emphasis added.)

“‘Article IX. Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.’

“Section 13(a) of the Boulder Canyon Project Act provides:

“‘The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled, “An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes,” is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.’

“The joinder of these Upper Basin States is not necessary when based upon an assertion of the existence of controversy among the Lower Basin States

as to Arizona's status in relation to the Compact because (1) this is a suit by a State to quiet title to water of the Lower Basin; (2) the Compact does not apportion water among the States—but only between the Basins; (3) by considering Article VIII of the Compact it is clear that, regardless of how this question is resolved, it will not determine Arizona's right to waters of the Colorado River System. The only part of the Colorado River System involved here in which it has an interest is the Lower Basin; (4) the Compact does not provide for any change in the Upper Basin's rights or obligations whether or not Arizona becomes a party to said Compact; (5) should resolution of this question have a bearing on whether or not Arizona becomes a party to said Compact, or not, is a matter of concern to water users in the Lower Basin only."

(See Special Master's Report, pages 46, 47 and 48.)

In Section III of her motion, the United States says, "If this Court should declare that Arizona is not a party to the Colorado River Compact the United States of America has an immediate concern respecting its international obligations to deliver water arising in connection with its treaty with the United Mexican States."

Again we disagree. Article III(c) of the compact provides that the water due the United States of Mexico under the Mexican treaty shall be supplied from waters which are surplus over and above the Upper Basin and Lower Basin apportionments set forth in Articles III(a) and III(b), and further provides that if the surplus shall prove insufficient, that the burden of the deficiency shall be equally borne by the Upper Basin and the Lower Basin.

The Compact does not impose any direct burden upon the State of Arizona for the Mexican treaty water. The compact apportions the burden upon the two basins. Whether Arizona is or is not a party to the compact, does not change the burden upon either the Upper or Lower Basin.

As we have pointed out heretofore, Arizona is not claiming any rights to the use of water in derogation or outside of the compact. Her claims are under the compact, and her claims are specifically subjected to the provisions

of the Colorado River Compact. The burden of the Mexican treaty water falls upon the users in both basins. If Arizona is not entitled to any water under the compact, she has no burden. If Arizona is entitled to water under the compact, then her rights in the Lower Basin are subject to the burden of the Mexican treaty water. In this litigation, whether Arizona is or is not a party to the Colorado River Compact, has no effect on either the Lower Basin's or Upper Basin's obligations with respect to the Mexican treaty water.

II. INDIAN RIGHTS HAVE NO BEARING ON THE QUESTION OF JOINDER IN THIS ACTION.

In Section V of its motion, the United States contends that the question of Indian rights has a bearing on the determination of the question of joinder. In the last paragraph of Section V of her motion, the United States says:

"If the Indian claims are held to be 'against the river' as distinguished from the Lower Basin as defined by the Colorado River Compact, that conclusion would have far reaching effect on the interests of all of the states in the Colorado River stream system."

The question of Indian claims and their bearing on the question of joinder was discussed quite extensively in the briefs of the parties and in the oral argument before the Master.

The Special Master's analysis of the interests of the United States, including Indian claims, in this litigation and their bearing on the joinder question is as follows:

"3. Claims Of The United States Of America, Intervener.

"The California defendant urge the view that the United States of America, as an intervener in this cause, has the same rights as an original party to determine the scope of the controversy. It is the Master's view that there is no need to answer this, because even were it so, this is disposed of by the fact that the United States here asserts no rights against the Upper Basin States as to Upper Basin waters.

"We find that the United States, as an intervener,

does not attempt, even were it allowable so to do, to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin. Its Petition of Intervention sets forth the following (p. 25):

“General Claims of the United States of America in the Colorado River System *in the Lower Basin*.”

“The United States of America asserts claims, *as against the parties to this cause, of rights to the use of water in the Colorado River and its tributaries—*’ (Emphasis added.)

The parties were and are Lower Basin States.” (Special Master’s Report, page 44.)

“10. Shall The Use of Colorado River System Waters By Indians Be Charged To The States In Which Such Uses Are Situated?”

“This question is a question to be resolved in each Basin. How it is done in one Basin has no relationship to how it is done in the other.

“Article VII of the Colorado River Compact provides—

“‘Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.’

“Article VIII of said Compact bears upon this. It provides that ‘Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact.’ It also provides that when ‘storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.’

“After these provisions, Article VIII also provides that ‘all other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from

the water apportioned to that Basin in which they are situate.'

"From this, it appears that the rights of the Indian tribes in the Upper Basin shall be satisfied solely from waters of the Upper Basin, and the rights of Indian tribes in the Lower Basin shall be satisfied solely from water appropriated to that Basin.

"The question of how Lower Basin waters shall be divided among the Lower Basin States is one for final hearing." (Special Master's Report, pages 53 and 54.)

"15. Arguments Based Upon The Pleading and Prayer Of The United States Of America, Intervener, On The Merits Of The Cause.

"The California defendants, in a view to which the State of Nevada, Intervener, subscribes, contend that the United States of America, in its Petition for Intervention, asserts claims to Colorado River System water, and that this is a basis for joining the absent States because the rights of the absent states will be affected by any degree in which the United States is granted title to the use of any Colorado River System water.

"The opponents of the Motion submit that the claims made by the United States of America, in its Petition for Intervention, are insufficient on which to base joinder because (1) the United States is asserting rights only in the Lower Basin, and (2) that the Upper Basin States are not using all the water to which they are entitled and it therefore will not affect them in any way. However this may be, it is not alleged by anyone that the Upper Basin States are taking more than their share.

"We find that the United States, as an intervener, even were it allowable so to do, does not attempt to enlarge the scope of this cause. The United States is asserting rights solely to the use of water in the Lower Basin. Its Petition for Intervention sets forth the following (p. 25):

'GENERAL CLAIMS OF THE UNITED STATES OF AMERICA IN THE COLORADO RIVER SYSTEM IN THE LOWER BASIN.

“The United States of America asserts claims, as against the parties to this cause, of rights to the use of water in the Colorado River and its tributaries—”
(Emphasis added)

“The parties to this cause were and are Lower Basin States.

“The Upper Colorado River Basin Compact, to which all these absent States are parties, as is the United States, specifically provides for the use of water by the United States in the Upper Basin by Articles VII and XIX.

“We find that the claims of the United States to Lower Basin waters made in this cause furnish no ground for joining the absent states.”

(Special Master’s Report, pages 59 and 60).

Article VII of the Upper Basin Compact referred to by the Master reads:

“The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.”

The pertinent parts of Article XIX of the Upper Basin Compact referred to by the Master are:

“Nothing in this Compact shall be construed as:

“(a) Affecting the obligations of the United States of America to Indian tribes;

“(b) Affecting the obligations of the United States of America under the Treaty with the United Mexican States (Treaty Series 994);

“(c) Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado River System, or its capacity to acquire rights in and to the use of said waters; . . .”

The Upper Basin Compact was ratified by the Upper Division States and consented to by the Congress of the United States.

There are no allegations in the pleadings that the Upper Basin States have violated these provisions of the Upper Basin Compact or any provisions of the Colorado River Compact. There is no allegation that the Upper Basin States are depriving the United States or the Indians in either the Upper or Lower Basins of the River of any water.

The issue in this case is the division of the water use apportioned to the Lower Basin by the Colorado River Compact. As the Master pointed out, the Upper Basin States have divided the Upper Basin apportionment by compact. The Lower Basin States are attempting to accomplish their division by litigation. There is no good reason that the Upper States should be drawn into this controversy to determine the basic issues in this litigation. The Master so found after extensive hearings and consideration of the same legal questions which are set forth in the motion of the United States.

CONCLUSION

We respectfully submit that the legal questions set forth in the motion of the United States, and their bearing upon the issue of joinder, were fully discussed and considered in the briefs filed with this Court on the joinder motion. These legal questions and their effect on the issue of joinder were further orally argued before the Special Master at Phoenix, Arizona. It is apparent from the Report of the Special Master that he gave full consideration to these legal questions and their bearing on the issue of joinder. The Master's Report and his conclusions and recommendation are before the Court for its determination.

The United States had ample opportunity to participate in the discussions by filing briefs with this Court or by participating in the oral argument before the Special Master at Phoenix, Arizona. The United States elected not to participate.

We respectfully submit that the motion of the United States, requiring further briefs to be filed in connection with these matters, should be denied.

Respectfully submitted,

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